



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

PSYCHOLOGICAL LITERATURE

A Treatise on Facts, or the Weight and Value of Evidence, by C. C. MOORE. Northport, Long Island, N. Y., Edward Thompson Company, 1908. Two vols., pp. clxviii, 730 and 731-1612.

In *Law Notes* for October, 1907, there appeared a rather personal little article by Mr. Charles C. Moore, the author of the work under review, in which the vials of contempt were poured upon Professor Münsterberg's "Nothing but the Truth," a paper which came out in *McClure's Magazine* for September of the same year. I quote a few characteristic passages. "The judge need not exercise, nor even possess, any reasoning faculty. All he needs is faith in the expert. But there's the rub. Infidelity is rife on the bench." "On almost every topic that has a proximate and practical relation to the trustworthiness of testimony delivered in court, the judges have the psychologists 'beaten a mile.'" "We never find a judge citing or quoting a psychologist." "A treatise on Attention and Memory that would be more voluminous than any entire work on Psychology ever written, could be compiled from the opinions of judges." "Suppose a witness declares he did *not* observe an occurrence. By what reliable means would the psychological expert test that witness in support of a theory that he did observe but has forgotten?" And so on.

The 'psychological expert' was not, of course, seriously affected by this criticism. He knew, first of all, how difficult and how unwelcome is the task of popularizing psychology. There is an old and crusted psychology of common sense which everybody carries about with him; so that the psychologist can hardly open a newspaper, or glance through a magazine, or even sit through a dinner, without receiving dogmatic instruction in some field of his specialty. He could admire, then,—this psychological expert,—Professor Münsterberg's courage in attempting to bring into general notice a growing and practically unknown branch of psychological research; and he could make due allowance for the exaggeration into which the attempt at clearness had led the author of the *McClure* articles. Moreover, he knew that the serious work in the *Psychologie der Aussage* had been published in other languages than English; he knew that this work was being taken seriously by the legal profession in other lands; and he knew that the outside reader would look in vain for any account of it in the pages of Mr. Spencer, President Porter, Dr. Ladd, Ribot, or Dr. James, if only for the reason that an author, however well-reputed, cannot give an account of what does not yet exist. And further, he knew, being a psychologist, that every man is tempted to magnify his own profession; he could make allowance for the legal bias of the student of law; he could take Mr. Moore's *sesquipedalia verba* with a grain of tolerant salt. Finally he knew, what perhaps was more important than anything else, the true character of the original *Aussage*-work, its laborious, cautious experimentation and its hesitant, qualified conclusions. He could be content to let the legal critics furiously rage together, in the assured confidence that his methods would ultimately prove themselves and, so far as they should be proved valid, would ultimately win acceptance.

In the meantime, while experimental work upon the psychology of

evidence is still going on, Mr. Moore has published his two volumes on *Facts*, or the *Weight and Value of Evidence*, legally regarded. Here, then, is the lawyer's substitute for a psychology; or rather, here is his applied psychology, compiled in the main from court decisions, but leavened to some slight extent by quotation from non-legal (even psychological) authorities. To accomplish his task, the author "has scanned page by page some thousands of volumes of reports in the United States, Canada, and England." After a general introduction, he presents his materials under the headings: degree of proof; uncontradicted testimony; incredibilities and improbabilities; sound and hearing; light and sight; taste, smell and touch; distance; speed; the weather; course and bearing of vessels; presumptions, inferences and circumstantial evidence; handwriting and typewriting; observation; memory; age, sex, intelligence or insanity of witnesses; affidavits, sworn pleadings and depositions; credibility of witnesses in general; perjury and mistake; bias of witnesses: impeachment, contradiction and corroboration; declarations, admissions, confessions, oral contracts; positive and negative testimony; demonstrative evidence, experiments and photographs; identification of persons and things; expert and opinion evidence; construction of testimony and sundry topics; and weight of evidence in appellate courts. All this material, occupying (with the footnote references) 1,431 pages, lies before me for review. I have read nine-tenths of it, but I cannot do more than offer a few general remarks.

It is clear that no one but an experienced lawyer could tell, without turning up a multitude of references, whether Mr. Moore's compilation has the supreme virtue of works of its class, the virtue of accuracy. I can make no pretence to a judgment on this point. The volumes give every impression of scrupulous care; and I shall assume that this impression is correct. That being granted, the first thing to say is that Moore on *Facts* is a legal text-book of an entirely novel kind, and one that should prove of immense value to the lawyer in the practice of his profession. The second thing to say is that the making of the book must have involved a truly appalling amount of labor. "The fact that the topics discussed in these volumes have seldom been treated by text-writers, and even more rarely with any citation of judicial authority, is undoubtedly attributable partly to ignorance of the treasures buried in the reports, and partly to lack of courage and industry to pursue a laborious quest for them." The list of cases quoted occupies 116 pp. of double-columned fine print; the list of legal authorities referred to totals, on a rough count, nearer three than two hundred. And the third thing to say is this: that the layman in matters of law cannot but marvel at the range of cast and the fineness of mesh of the legal net, at the scope of the topics discussed and at the minuteness of detail with which these topics are treated. On these three points Mr. Moore's books are deserving of unstinted praise. Their author has also read widely in non-legal literature, the psychological included; he quotes from writers so recent as Thorndike and Stratton and Baird.

Here, however, is the point at which criticism must set in. Mr. Moore has read widely, but he has not read critically, in non-legal literature. The objection is not serious, since one cannot expect a critical judgment from the non-expert; it is, however, regrettable that advice was not sought from—Professor Münsterberg, or some similarly competent psychologist. Modern psychology is so much a matter of the technical magazines, and so little a thing of text-books, that the uninformed reader is exceedingly likely to go astray. Nevertheless, this objection, as I said, cannot be regarded as serious. Much more

important is the fact that Mr. Moore has confined himself exclusively to works and translations in English, and makes no reference whatever to the other modern languages. From the point of view of psychology, and more particularly of the psychology of evidence, this defect is most grave. It is, moreover, a defect that might easily have been overcome by the help of the psychologist *von Fach*. The literature of the *Aussagepsychologie*—what shall be the English equivalent? the psychology of record, or of report, or of evidence?—this literature is scattered, but it is not bulky.

For the rest, I can, as I have said, only set down a few critical impressions. It is no reflection upon Mr. Moore or upon the law to say that the contents of these volumes are empirical. That, in the nature of the case, they must be. But there can be no doubt that Professor Münsterberg was right in his contention, however severely handled in *Law Notes*, that the applied psychology of the court of justice is "the primitive psychology of common sense." And this it need not be. Mr. Moore's reader is inevitably reminded of the recent controversy between Wundt and Delbrück. The great philologist had remarked, in effect, that he saw a good deal to praise in Wundt's psychology, but that, for his own part, he got along very well with Herbart. And Wundt replied that Herbart was psychologically dead; and that, if the philologists wanted to apply psychology at all, they had better go to something that was alive. Now there is, evidently, a vast deal of applied psychology in the law. Why not, then, apply a modern psychology, a living psychology? Why try to apply that common-sense psychology which it is the first effort of the teacher of psychology to break up in his hearers? Modern psychology has learned, for instance, to draw a clear-cut distinction between experience and report of experience, between the adequacy or reliability of perception, memory, etc., and the adequacy and reliability of the verbal report upon things perceived and things remembered. It has learned, also, to group its materials; it would not have counselled the putting of observation in ch. xvi and the bias of witnesses in ch. xx; or, indeed, the co-ordination of the general method of observation (for observation is simply method) with the specific function of memory. This sort of criticism might be multiplied a hundredfold; but it will do little good until the legal profession shall have been convinced, by aid rendered in concrete instances, that it is at all worth while to transcend the psychology of common sense and to master the rudiments of mental science.

Another general impression that I have gained from the reading of Mr. Moore's volumes is that the position of the expert, in legal regard, is extremely unsatisfactory. First and foremost, I think, because the law makes small distinction between one expert and another, between the empirical familiarity of the handwriting expert and the knowledge of principles possessed by the man of science. But secondly because the expert is often tied down to what I must call illegitimate questions, questions that he would never put to himself and that he can answer, if at all, only conditionally. Every scientific man knows that the outsider's questions are those most difficult to answer; they are for the most part questions of casuistry, and they are more likely than not to presuppose an attitude or a set of postulates which the scientific man cannot adopt or recognize. I feel that I am, in this matter, upon unfamiliar ground, and I hope that I am doing no injustice to legal procedure. My impression is as I have given it; and I cannot help thinking that a body of trained middlemen, versed both in psychology and in the various forms of its application that the law demands, would be as useful here as in education or in psychiatry.

Something, at any rate, is wrong, when Mr. Moore can head a section: 'Expert Opinion Evidence Not a High Grade of Evidence,' and can state that "'expert evidence, while useful in many cases, is dangerous in all,' is a judicial rubric found in substance in many reported opinions." The retort is obvious that this is, itself, an expert opinion, and therefore open to mistrust. But that apart, it is clear that the existence of a body of trained intermediaries between the different sciences and the law would go far to remove "the little confidence [reposed] in the opinions of experts and professors, who often have more knowledge than judgment."

I pass to another point. Modern psychology teaches that the mind is a stream of fluid and changing processes, but that these fluid processes are without exception governed by law, that they evince thorough-going uniformities. A large number of laws or uniformities have already been formulated; and where formulation is still, from our ignorance, impossible, we nevertheless believe that uniformity of occurrence is present. The mind which I seem to see pictured in Mr. Moore's pages is, on the contrary, a static and discrete mind; a mosaic of informations and prejudices; a mind whose furniture, while subject to decay with time, is in meaning and intention permanent, as it were bought to last; and a mind, finally, which is governed by rules that have exceptions. In saying this I am, of course, merely saying in a slightly different form what has already been said: that the psychology of the courts is that of common sense and not of science. The common-sense view of mind comes out, however, with such fatal clearness in Mr. Moore's book that it seems worth while to give this aspect of legal theory a separate mention.

Let me take, by way of illustration, the chapter on memory, which fills 260 pp. and contains more than two thousand citations of cases. The opening section is entitled "The Laws which Regulate the Human Memory." Yet the only law of which one finds mention is the law that memory is obscured by lapse of time. And the passage which the author regards as the most important in this chapter, "or perhaps in the entire work," runs as follows: "Judges prefer to consider all the attending circumstances, and then decide for themselves whether the witness was likely to have remembered, or on the other hand to have overlooked or forgotten." Comment is needless; and it would appear that the author's numerous quotations from psychological text-books are superfluous. As a matter of fact, however, Mr. Moore's opening section does him injustice, for there are many indications of the laws of memory—its dependence on interest and attention, on physical and mental constitution, on age and sex, on the nature and time-relations of stimulus,—in the course of the discussion. As an example of the rule with exceptions we may take the treatment of memory of unpleasant experience. There is a tendency, the author declares, for pleasing reminiscences to take precedence of those that are offensive. *But* there can be no safe conclusion as to the impermanency of disagreeable or painful impressions. I give this illustration, not because psychology has established the laws of memory in respect of pleasantness and unpleasantness, but precisely for the opposite reason, that it has not, and for the collateral reason that it very well can. Here is just the place where the expert, the psychologist of application, might step in, to discover the uniformities that underlie the rule-with-exception of the courts. The unsatisfactoriness of that rule can hardly escape the notice even of the most empirically inclined.

In the above reflections I have been criticising the present status of legal theory and practice rather than the contents of Mr. Moore's

work. My excuse must be that he himself challenged such criticism in his article in *Law Notes*. He invited a comparison between the psychology of memory and attention, as set forth by the psychologist, and its psychology as set forth in the law reports. There is, in fact, no comparison. The psychology of the reports is scrappy and out-of-date. This verdict is less harsh than it sounds, since the same thing might be said of a good deal of recent educational psychology, medical psychology, linguistic psychology, social psychology. All these psychologies, however, are emerging, more or less quickly, from the shadow of tradition and common sense; and with the appearance of the *Aussagepsychologie* the practical psychology of testimony is on the path of progress. Meanwhile, let no jurist suppose that the psychologist underestimates either the magnitude of the task before him or the high level of empirical achievement to which the legal profession has attained. Mr. Moore's work amply testifies, both to his own training and industry, and to the mental caliber of the judges whose views he has assembled.

P. E. WINTER.

Buddhism and Immortality. The Ingersoll Lecture, 1908. By WILLIAM STURGIS BIGELOW. Boston and New York, Houghton Mifflin Co., 1908. pp. 75. Price c. 75.

The lecture outlines the teaching of the Buddhism of Northern India and Japan, which is closely allied to Brahminism, as regards human immortality. Briefly put, that teaching is that the self is a resultant of mortal and immortal factors, the former being sensations and emotions, and the latter the will. There is constant conflict between the two opposed forces, and we may assist our own progress towards immortality either indirectly, by the performance of good actions, or directly, by the turning of will upon character. After life in this world we pass to a sort of angelic state, where existence is still personal; and beyond that we reach the ultimate, impersonal peace of nirvana.

The point of greatest interest to the psychologist is, perhaps, the writer's account of the transmigration or re-birth of souls. Sensations are perishable, but sensations often repeated lead to habitual, automatic and reflex action; they thus gain in length of life. Western science then speaks of heredity or atavism, the persistence of a parental or ancestral type; Eastern thought finds illustration of re-birth or re-incarnation. In comparing the two views, Mr. Bigelow writes as follows.

"First. If material constitution, that is, inheritance . . . modified by the tendency to variation, is the cause of character, then, as the laws of matter do not vary, we have no way of accounting for the tendency to variation itself . . . whereas, if the psychical characteristics . . . are the dominant factor, the tendency . . . follows as a matter of course.

"Second. If material constitution is the cause of character, the range of variation ought to be equally great in different forms of animal life. . . Whereas [if the soul is dominant], we ought to find the greatest variation where the characters are most complex,—which we do.

"Third. Family resemblance often asserts itself most clearly in the second generation. [And it appears most clearly when the grandparent has been dead less than ten years. Moreover, it appears once only, however many the grandchildren.] Heredity by transmission offers no explanation of either fact. Whereas, from three to ten years is the ordinary interval for re-incarnation, and the single resemblance is the natural result of the re-birth of a single soul." Mendel's Law?